

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

74-1188

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

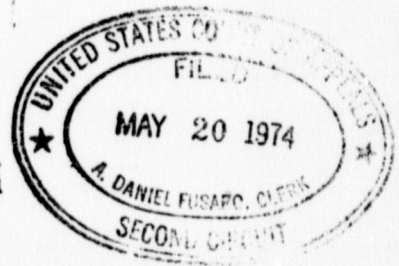
GEORGE CANTON, a/k/a
George Combes,

Appellant.

*On Appeal From The United States
District Court For The Southern
District of New York*

APPELLANT'S BRIEF

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INDEX TO THE BRIEF

	<u>Page</u>
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
STATUTES INVOLVED	8
POINT ONE ---	10
The Court Did Not Unambiguously Charge the Jury that in Order to Convict the Government Must Prove Beyond a Reasonable Doubt Each Element of the Crime Charged.	
CONCLUSION	14
Cases:	
JOHNSON V. FLORIDA 391 U.S. 596 (1968)	13
MC ABEE V. UNITED STATES 434 F. 2d 240 (2nd Cir. 1973)	13
UNITED STATES V. CLARK 475 F. 2d 240 (2nd Cir. 1973)	12
United States Code:	
TITLE 18, SECTION 2	1
TITLE 18, SECTION 2113(a)	1, 8
TITLE 18, SECTION 2113(d)	1, 9

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

GEORGE CANTON a/k/a
George Combes,

Appellant.
-----x

APPELLANT'S BRIEF

This is an appeal from a judgment of conviction, entered on February 6, 1974 in the United States District Court for the Southern District of New York.

The appellant and Raymond Solomon were charged in a two-count indictment with forcefully taking money from a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, as well as participating in an assault in the commission thereof, all in violation of Title 18, United States Code, Sections 2113(a)(d) and 2.

Combes and Solomon were jointly tried before Hon. Edmund L. Palmieri and a jury and each found guilty as charged. The latter who was sentenced as a young adult offender pursuant to

Title 18, Section 5010-B as extended by Section A209, of the United States Code, has moved to withdraw his appeal. The appellant was sentenced to imprisonment for a term of twenty (20) years on both counts, each to run concurrently, and which he is presently serving.

Statement of Facts

The facts as adduced by the Government pertinent to the appeal can be set forth in the following narration.

Herbert Yarkon, an investigator for the Chemical Bank, testified that its deposits were insured by the Federal Deposit Insurance Corporation and that on August 9, 1973, he went to the Chemical Bank branch at 9 East 167th Street, Bronx, New York, where a cash audit disclosed a loss of \$36,610.00.

The witness further described the locations and workings of cameras which had been actuated during the robbery on the aforesaid date.

Joseph Camacho, testified that on August 9, 1973 he was at the bank when two men jumped over the counter and a man standing behind him yelled "This is the real thing. Don't nobody move."

Camacho further related that he was unable to see the face of any of the three men. However, the man in back of him had a gun in his left hand, a watch in his right hand and all three left the bank together. Camacho followed them, met Danny Santiago, a bank guard, hailed a gypsy cab and both followed the three men who had driven away in a white station wagon.

They drove a few blocks, then left the station wagon and Camacho thereupon left the cab and notified a police patrol car. After a short interval Camacho pointed out the three men to the police who ordered them to halt. They did not do so, but ran, and were followed.

Camacho further testified that later that afternoon he went to a precinct station where he identified the appellant as one of the men who had left the bank.

On cross-examination the witness conceded that he did not see the faces of any of the men while at the bank, or while they were leaving, or even while they entered and remained in the car. Furthermore he did not see the appellant while he was in the police car, but that the first time that he saw the appellant was "When the police car came to a halt on Anderson Avenue and I pointed to the three men to the police officers and we all got out of the car, and that's when I saw them." (T. 94). *

Camacho further conceded that he had never entered the premises at Woodcrest Avenue where the appellant had been arrested.

Daniel Santiago, a bank guard, testified that on

* The prefix "T" refers to the transcript of the trial on file with the Court.

August 9th, 1973, after returning from lunch he noticed a commotion and three black men ran towards him, entered a white station wagon and drove away. He and Camacho then hailed a gypsy cab, followed the station wagon, and saw the three eventually leave. Camacho then left the cab.

On Cross-examination the witness conceded that as the three black men went right by him he "didn't really take a good look at them" (T. 138), and that while he was in the gypsy cab it was not possible for him to see the faces of those in the station wagon (T. 143), nor could he see the faces of the three men who left the station wagon (T. 144). In short, he was unable to identify the appellant.

Josephing Blanding, a bank teller, described the robbery, but did not identify any of the participants therein.

Sgt. John T. Burns of the New York City Police Department, testified that on August 9, 1973, he was in a patrol car when he met Joseph Camacho, and thereafter saw two men moving into a vacant lot near Woodcrest Avenue. The lot was searched whereupon \$34,594.00 in United States currency, a reddish-brown envelope and an air-pistol were found.

Patrolman Ronald Naclerio of the New York City Police Department testified that he also participated in the search

of the aforesaid vacant lot and found two brown manila envelopes, United States currency, a pellet-type pistol, a hat and a nylon stocking.

Patrolman Thomas Higgins testified that while at the lot he saw Patrolman Naclerio with a white coat hanging therefrom. He then checked the adjacent house, saw a broken window in the back door, and thereupon he and other officers proceeded to search the house. While doing so he saw Patrolman Vierling pull the appellant out of a closet.

Patrolman Vierling testified that while participating in the search of the house at 1024 Woodycrest Avenue the occupant informed him that a bedroom door should not be locked from the inside. One of the police officers thereupon kicked it in and the appellant was found in a bedroom closet.

The foregoing, in essence, constituted the Government's case against the appellant whereupon a motion for a directed judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure was made and denied.

The appellant, who did not testify, nor call any witnesses on his own behalf, thereupon rested.

At the conclusion of the entire case a motion under Rule 29 was again made and denied.

The jury returned a verdict of guilty as charged.

Post verdict motions were made and denied.

STATUTES INVOLVED

TITLE 18, UNITED STATES CODE, SECTION 2113(a)

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny ---

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

STATUTES INVOLVED

TITLE 18, UNITED STATES CODE, SECTION 2

Principals. --- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (June 25, 1948, c. 645, § 1, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.)

TITLE 18, UNITED STATES CODE, SECTION 2113(d)

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

POINT ONE

THE COURT DID NOT UNAMBIGUOUSLY CHARGE THE JURY THAT IN ORDER TO CONVICT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT EACH ELEMENT OF THE CRIME CHARGED.

The court charged the jury that:

" Before you may convict either or both defendants on Count 1, the government must prove four essential elements, each one beyond a reasonable doubt, as to the defendant in question. If there is a reasonable doubt as to any one of these essential elements, the defendant should be acquitted." (T. 443)

At the conclusion of its charge the Court afforded the appellant the opportunity to take exception or make suggestions with respect to its charge.

The appellant's attorney then took exception in the following fashion:

" MR. KRIEGER: Sir, if your Honor please, I respectfully take exception to the following portion of the court's charge:

Your Honor stated -- and this is to the very best of my recollection -- 'If you entertain a reasonable doubt as to the elements of the crime, then it is your duty to acquit.'

I respectfully submit that it is the exact opposite which should be set forth to the jury, namely, that it is the duty of the jury to return a verdict of not guilty unless the prosecution has proven beyond a reasonable doubt each and every element of the crime charged." (T. 474-5).

The Court thereafter responded:

" THE COURT: Wait a minute. I want to tell you what I intend to do so that if I don't do it you will call it to my attention.

I think that what I said was that if they entertained a reasonable doubt about any of the elements of fact necessary to dispute the offense, that then it was their duty to acquit the defendant.

You except to that; is that right?

MR. KRIEGER: Yes, sir.

THE COURT: If they have a reasonable doubt about any of the facts necessary to dispute the crime, they should acquit the defendant. You say that that's wrong.

MR. KRIEGER: Yes, your Honor.

THE COURT: I have charged that for years in many cases that have been affirmed by the Court of Appeals. This is the first time anybody has ever found anything wrong with it, so I refuse to change that."

(T. 479-80).

It delivered a supplemental charge wherein it stated:

" The burden is always on the government and it never shifts to the defendant to prove the defendant guilty beyond a reasonable doubt."

(T. 487).

The appellant submits that the charge as given, the refusal to correct or modify the same, and the ambiguity inherent therein, deprived the appellant of the absolute and unqualified right to have the jury simply and directly charged that the

Government, in order to convict, must establish each and every essential element of the crime charged beyond a reasonable doubt.

It is fundamental that a defendant in a criminal cause, if he is to be found guilty, has the absolute and unqualified right to insist that the jury be told that the Government must prove each and every essential element of the crime charged beyond a reasonable doubt.

For a Court to charge as was done here, that in order to convict "the government must prove four essential elements, each one beyond a reasonable doubt, as to the defendant in question."

And then in the very next sentence say that: "If there is a reasonable doubt as to any of the essential elements, the defendant should be acquitted," is naught but a vitiation of the prosecutorial burden of establishing guilt only if and after it has proven the same by proof beyond a reasonable doubt.

This Court in United States v. Clark, 475 F. 2d 240, 243 (2nd Cir. 1973) held that:

" If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt,

see Holland v. United States, 348
U.S. 121, 138, 75 S. Ct. 127, 99
L. Ed. 150 (1954); United States v.
Lodwick, 410 F. 2d 1202, 1204 (8th
Cir. 1969). "

The Government must prove beyond a reasonable
doubt every element necessary for conviction. Johnson v.
Florida, 391 U.S. 596, 598 (1968); McAbee v. United States,
434 F. 2d 361, 363 (9th Cir. 1970).

The Court must likewise so charge the jury without
equivocation, it however steadfastly and erroneously refused
to do so.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

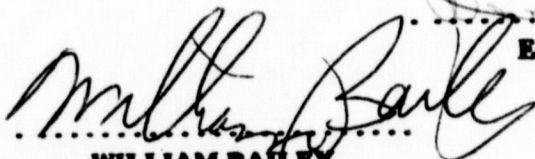
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(212) WO 6 - 5911

AFFIDAVIT OF PERSONAL SERVICE

**STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:**

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 15 day of April, 1974 at No. 148 Conthousen, N.Y.C. deponent served the within upon M. J. Patterson the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 15 day of April 1974


.....
WILLIAM BAILEY


Edward Bailey

Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975

